295

No. 06-1164

IN THE
Supreme Court of the United States

John R. Sand & Gravel Co.,
Petitioner,

v.

United States,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE METAMORA GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF THE *AMICUS CURIAE* 1
STATEMENT 1
I. THIS COURT SHOULD EITHER AFFIRM THE COURT OF APPEALS OR, IN THE ALTERNATIVE, DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED ON THE GROUND THAT THE COURT OF APPEALS DID NOT NEED TO REACH THE QUESTION WHETHER SECTION 2501 IS JURISDICTIONAL 3
A. The Court of Appeals Erred in Concluding that It Was Required to Decide as a Threshold Matter Whether Section 2501 Imposes a Limitation on Subject-Matter Jurisdiction. 7
B. There Were No Barriers to the Federal Circuit's Application of Section 2501's Time Limit as a Matter of Discretion 11
II. SECTION 2501 IS A MANDATORY, JURISDICTIONAL LIMITATION ON THE FILING OF SUITS AGAINST THE UNITED STATES 17
A. This Court's Decision in *Bowles v. Russell* Confirms This Court's Repeated Prior Holdings That Section 2501 Limits the Court of Federal Claims' Subject-Matter Jurisdiction 17
B. Petitioner's Attempts to Distinguish This Court's Precedent Are Unavailing. 21
C. The Conclusion That Section 2501 Is Jurisdictional is Consistent With This Court's Equitable Tolling Jurisprudence 24
CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Ashwander v. *TVA*, 297 U.S. 288 9
Block v. *North Dakota*, 461 U.S. 273 (1983) 21
Board of Regents v. *Tomanio*, 446 U.S. 478 (1980) 21
Bowles v. *Russell*, 127 S. Ct. 2360 (2007) ..... passim
California v. *Arizona*, 440 U.S. 59 (1979) 21
Carnival Cruise Lines v. *Shute*, 499 U.S. 585 (1991) 9
Chambers v. *NASCO*, 501 U.S. 32 (1991) 11
Coleman v. *Miller*, 307 U.S. 433 (1939) 21
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 27
DaimlerChrysler Corp. v. *Cuno*, 126 S. Ct. 1854 (2006) 20
Day v. *McDonough*, 547 U.S. 198 (2006) ..... passim
Demore v. *Kim*, 538 U.S. 510 (2003) 12
Eberhart v. *United States*, 546 U.S. 12 (2005) 19, 20
Fry v. *United States*, 421 U.S. 542 (1975) 12
Gomez v. *United States*, 490 U.S. 858 (1989) 9
Granberry v. *Greer*, 481 U.S. 129 (1987) 11, 14, 15, 16
Gray v. *Netherland*, 518 U.S. 152 (1996) 17
Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501 (1947) 12
Gupta v. *Thai Airways Int'l Ltd.*, 487 F.3d 759 (9th Cir. 2007) 5
Harris Truck Lines, Inc. v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) 19, 20, 25
Hibbs v. *Winn*, 542 U.S. 88 (2004) 27
Hormel v. *Helvering*, 312 U.S. 552 (1941) 14
In re Papandereou, 139 F.3d 247 (D.C. Cir. 1998) 8
INS v. *St. Cyr*, 533 U.S. 289 (2001) 23
Irwin v. *Dep't of Veterans Affairs*, 498 U.S. 89 (1990) passim
Irwin v. *Veterans Admin.*, 874 F.2d 1092 (5th Cir. 1989) 25
John R. Sand & Gravel Co. v. *Brunswick Corp.*, 143 F. App'x. 317 (Fed. Cir. 2005) 12, 14
John R. Sand & Gravel Co. v. *United States*, 127 S. Ct. 2877 (2007) 6

John R. Sand & Gravel Co. v. *United States*, 59 Fed. Cl. 645 (2004) 2
John R. Sand & Gravel Co. v. *United States*, 60 Fed. Cl. 272 (2004) 13
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 20, 22
Leatherman v. *Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163 (1993) 27
Link v. *Wabash R.R. Co.*, 370 U.S. 626 (1962) 11
Mass. Food Ass'n v. *Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560 (1st Cir. 1999) 12
Molina v. *INS*, 981 F.2d 14 (1st Cir. 1992) 12
Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 7
Pinney Dock & Transp. Corp. v. *Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir. 1988) 12
Plaut v. *Spendthrift Farm*, 514 U.S. 211 (1995) 10
Romero v. *Int'l Terminal Operating Co.*, 358 U.S. 354 (1959) 20
Ruhrgas AG v. *Marathon Oil Co.*, 526 U.S. 574 (1999) 7, 8
Scarborough v. *Pargoud*, 108 U.S. 567 (1883) 18
Scarborough v. *Principi*, 541 U.S. 401 (2004) 28
Schiro v. *Farley*, 510 U.S. 222 (1994) 11
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 10
Singleton v. *Wulff*, 428 U.S. 106 (1976) 12, 14
Sinochem Int'l Co. v. *Malaysian Int'l Shipping Corp.*, 127 S. Ct. 1184 (2007) 8
Soriano v. *United States*, 352 U.S. 270 (1957) ..... passim
Sosa-Valenzuela v. *Gonzales*, 483 F.3d 1140 (10th Cir. 2007) 5
Spector Motor Serv. v. *McLaughlin*, 323 U.S. 101 (1944) 9
Steel Co. v. *Citizens for Better Env't*, 523 U.S. 83 (1998). 7, 8
Swan v. *Peterson*, 6 F.3d 1373 (9th Cir. 1993) 12
Teague v. *Lane*, 489 U.S. 288 (1989) 14, 15
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 27
United States v. *BASF-INMONT Corp.*, 819 F. Supp. 601 (E.D. Mich. 1993) 2

United States v. *Beggerly*, 524 U.S. 38 (1998) 26, 27
United States v. *Brockamp*, 519 U.S. 347 (1997) 26, 27
United States v. *Curry*, 47 U.S. 106 (1848) 18
United States v. *Dalm*, 494 U.S. 596 (1990) 27
United States v. *Resendiz-Ponce*, 127 S. Ct. 782 (2007) 8
Valley Forge Christian Coll. v. *Ams. United for Separation of Church & State*, 454 U.S. 464 (1982) 21
Young v. *United States*, 535 U.S. 43 (2002) 26

Constitutional Provisions

U.S. CONST. AMEND. V 28

Statutes

26 U.S.C. 6511(d) 28
28 U.S.C. 1491(a)(1) 10, 21
28 U.S.C. 2107(c) 17, 19
28 U.S.C. 2244(d)(1)(A) 23
28 U.S.C. 2501 ..... passim
42 U.S.C. 2000e-16(c) 24, 27

Rules

S. Ct. R. 37.6 1

INTEREST OF THE *AMICUS CURIAE*[1]

The Metamora Group is a group of companies that disposed of waste in a landfill, which ultimately required environmental remediation. That remediation, which petitioner claims constituted a "taking" of its alleged right to mine within the landfill, forms the basis for petitioner's underlying claim in this matter. Metamora entered into a Consent Decree in 1993 with the United States, establishing Metamora's cleanup responsibilities related to the landfill. The United States has indicated that, under the Consent Decree, it will seek indemnification from Metamora for any liability to petitioner. Metamora participated in settlement negotiations, unsuccessfully attempted to intervene in the case in the trial court, and participated as *amicus curiae* in the court of appeals at the direction of the court. It was Metamora that raised the question of the timeliness of petitioner's suit in the court of appeals.

STATEMENT

Petitioner brought this suit in the Court of Federal Claims under the Tucker Act alleging that respondent had taken its property rights without just compensation. At the inception of the case, in its Motion to Dismiss, respondent argued, *inter alia*, that the suit was filed too late under the applicable six-year statutory time limitation in 28 U.S.C. 2501 ("Section 2501"). The trial court denied respondent's Motion to Dismiss. Ultimately, the trial court ruled in favor of respondent on the merits following trial.

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

Amicus curiae, the Metamora Group ("Metamora" or "Group"), a group of companies that disposed of waste in a landfill located on the property, and respondent entered into a Consent Decree ("Decree") in establishing Metamora's cleanup responsibilities related to the landfill. Respondent contends that the Decree requires Metamora to pay any judgment in petitioner's favor in this case. The Decree provides that the "United States' costs in this effort, including attorney's fees and other expenses and any compensation that the United States may be required to pay to the property owner, shall be considered costs of response and shall be reimbursed by [Metamora]." *John R. Sand & Gravel Co.* v. *United States*, 59 Fed. Cl. 645, 653 n.6 (2004) (citing *United States* v. *BASF-INMONT Corp.*, 819 F. Supp. 601, 620 (E.D. Mich. 1993)).

Metamora unsuccessfully sought intervention in the suit and also raised the timeliness defense in its proposed Answer. On appeal, respondent did not pursue the issue. Metamora, however, pressed it in an *amicus* brief. Petitioner's Reply Brief addressed the limitations argument (which, as noted, petitioner had also litigated in the trial court), and the parties addressed it at oral argument.

The court of appeals agreed with *amicus* that the suit was not timely filed and ordered the complaint dismissed. As a preliminary matter, the court held that it was obligated to decide the limitations issue notwithstanding that respondent had not pressed it. The court reasoned that "we must be satisfied that the court whose opinion is the subject of our review properly exercised jurisdiction, regardless of whether the parties challenge the lower court's jurisdiction." Pet. App. 15a. Because settled precedent of this Court and the Federal Circuit provided that the period of "limitations set forth in section 2501 is a jurisdictional requirement for a suit

in the Court of Federal Claims," the court held that "it may not be waived." *Id.* 16a.

On the merits of the limitations issue, the court of appeals held that petitioner's takings claim was not timely filed because it accrued in 1994, more than six years prior to the filing of petitioner's suit in 2002.

I. THIS COURT SHOULD EITHER AFFIRM THE COURT OF APPEALS OR, IN THE ALTERNATIVE, DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED ON THE GROUND THAT THE COURT OF APPEALS DID NOT NEED TO REACH THE QUESTION WHETHER SECTION 2501 IS JURISDICTIONAL.

This Court granted certiorari to decide whether Section 2501 limits the subject matter jurisdiction of the Court of Federal Claims. However, respondent raised in its brief in opposition (at 14-15), and petitioner has urged this Court in its brief on the merits (at 47-48), to decide an additional issue: whether the Federal Circuit would properly have analyzed the application of the six-year limitations period in any event as a matter of discretion rather than obligation, without regard to whether Section 2501 is jurisdictional.

This Court should either affirm the judgment of the court of appeals or alternatively dismiss the writ of certiorari as improvidently granted on the basis of that question. The issue is logically antecedent to the question presented, which at bottom asks whether the statutory time limitation is waivable or not. The logical progression of issues in determining whether to address the limitations period is: (i) whether the question was waived by a party; if so, (ii) whether the court should nonetheless exercise its discretion to decide the issue on some other basis (such as that it was presented by an

amicus); and if not, (iii) whether the issue must nonetheless be reached because it is not subject to waiver.

The court of appeals was not required by Article III of the Constitution to determine the jurisdictional status of Section 2501. A court's only obligation is to refrain from *reaching the merits* of the case without assuring itself of its jurisdiction. The Federal Circuit would not have impermissibly reached the merits by applying the *identical* statutory time limitation as a matter of its discretion, rather than first deciding the academic question of whether the limitations period is jurisdictional. See Part I.A, *infra*. Courts have discretion to consider questions raised by *amici* rather than the parties in appropriate circumstances. See Part I.B, *infra*. Further, had the court of appeals analyzed the question properly, it would have invoked its discretion to decide the argument raised by *amicus* without regard to whether the time period is jurisdictional because (i) *amicus* has a unique and substantial interest in the outcome of the case (in light of respondent's contention that *amicus* is obligated to pay any eventual judgment); (ii) in denying Metamora party status, the court of appeals had invited it to present its arguments as an *amicus*; (iii) the issue of whether Section 2501 barred petitioner's claim was addressed by the parties in the Court of Federal Claims, fully considered by the trial court, and addressed in the briefing and oral argument on appeal; and (iv) the relevant facts governing the application of Section 2501 are undisputed.

Affirmance or dismissal on this ground is appropriate for four reasons. First, this Court's guidance concerning the courts of appeals' obligation to decide jurisdictional questions and to issue jurisdictional rulings that are broader than necessary to dispose of the case would be of substantial benefit to courts of appeals nationwide. By contrast, the question presented – whether Section 2501 limits subject-matter jurisdiction – rarely arises and is not the subject of a circuit con-

flict. As a practical matter, that issue arises only on the rare occasion that the United States government fails to invoke a meritorious limitations defense that a claim is time-barred, which infrequently occurs.

By contrast, lower courts regularly confront the questions of whether and when to address their jurisdiction as a threshold matter. They often invoke a broad rule that they must first determine their own jurisdiction,[2] when, in fact, it is in many cases more appropriate to resolve a case on alternative non-merits grounds. See Part I.A, *infra*.

Second, the question presented has no consequence even for the parties to this case, because petitioner would be time-barred under Section 2501 regardless of whether it is jurisdictional. That is because, even if petitioner prevails in this Court with respect to the question presented, the court of appeals on remand will no doubt once again apply Section 2501 to bar the lawsuit as a matter of its discretion. Thus, the question presented for this Court's resolution is largely academic and can have no practical impact on the disposition of this case.

Third, as is discussed *infra*, established principles of judicial restraint counsel against resolution of the question presented. The question presented implicates numerous difficult constitutional questions under the Fifth Amendment and Article III, as well as competing assertions regarding whether precedent of this Court should be overruled. Those questions should be avoided if possible. When, as here, there are non-constitutionally sensitive grounds for resolving a case, con-

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[2] See, *e.g.*, Pet. App. 15a; *Gupta* v. *Thai Airways Int'l Ltd.*, 487 F.3d 759, 763 (9th Cir. 2007); *Sosa-Valenzuela* v. *Gonzales*, 483 F.3d 1140, 1143 (10th Cir. 2007).

sistent with principles of stare decisis, those arguments should be resolved at the outset.

Fourth, the equities weigh strongly against resolving this case on the basis of whether Section 2501 is jurisdictional, without considering Section 2501's application as a matter of discretion. The Federal Circuit's ruling that petitioner filed this suit too late is now final.[3] Although petitioner attempts to resurrect the case on the basis of a waiver by respondent of the limitations period, it is *amicus* that (according to respondent) must pay any judgment on the complaint. *Amicus*, however, has consistently pressed the limitations defense throughout the case and should be entitled to have its defenses to liability heard.

That conclusion is reinforced by the fact that, as evidenced by the record below, petitioner impermissibly sat on its rights before bringing this action and in any event has no claim on the merits. The Court of Federal Claims rejected petitioner's takings claim on the merits, and even the dissenting judge in the court of appeals would have affirmed on that basis. See Pet. App. 20a-28a; *id.* 39a-40a (Newman, J., dissenting). Petitioner challenges respondent's interference with its "exclusive right of use" of its property. But that interference began in 1992 or, at the very latest, when a fence was installed pursuant to the cleanup of the property in 1994. Petitioner, moreover, must have recognized that its takings claim was exceedingly weak. It voluntarily assisted in the expansion and operation of the landfill and, through that as-

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[3] The merits of the Federal Circuit's ruling concerning the accrual of petitioner's claim under Section 2501 was the second question presented by the Petition for Certiorari. See Pet. i. This Court granted certiorari limited to the first question, whether the limitations period is jurisdictional. See *John R. Sand & Gravel Co.* v. *United States*, 127 S. Ct. 2877 (2007).

sistance and its presence at the site during that time period, knew that huge quantities of waste (including tens of thousands of barrels of waste) were being deposited in the landfill. See Pet. App. 4a (summarizing Court of Federal Claims findings).

The judgment should accordingly be affirmed on alternative grounds or the writ of certiorari dismissed as improvidently granted.

A. THE COURT OF APPEALS ERRED IN CONCLUDING THAT IT WAS REQUIRED TO DECIDE AS A THRESHOLD MATTER WHETHER SECTION 2501 IMPOSES A LIMITATION ON SUBJECT-MATTER JURISDICTION.

The Federal Circuit erred in deciding whether Section 2501's time limitation may be waived, when the case could have been resolved simply by applying the statutory time limitation as a matter of discretion. The court of appeals considered itself bound to resolve the waiver question, reasoning that "[a]s an appellate court, we must be satisfied that the court whose opinion is the subject of our review properly exercised jurisdiction, regardless of whether the parties challenge the lower court's jurisdiction." Pet. App. 15a. But that overstates the rule. As this Court has explained, a federal court ordinarily "must be sure of its own jurisdiction *before getting to the merits*" of a case. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (emphasis added). Courts remain free to address alternative procedural questions that are "'logically antecedent' to Article III's [subject-matter jurisdictional] concerns." *Ibid.* (citing *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 88-89 (1998)).

On the basis of that principle, in *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574 (1999), this Court unanimously

held that, in appropriate cases, a court may decide personal jurisdiction before subject matter jurisdiction. This Court acknowledged the rule established in *Steel Co.*, *supra*, that "Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case." 526 U.S. at 583. But, "[w]hile *Steel Co.* reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues." *Id.* at 584. Although a court "act[s] ultra vires" if it "pronounce[s] upon [the merits] when it has no jurisdiction to do so" (*id.* at 583 (quoting *Steel Co.*, 526 U.S. at 583) (third alteration in *Ruhrgas*)), a "court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power" (*id.* at 584 (quoting *In re Papandereou*, 139 F.3d 247, 255 (D.C. Cir. 1998)) (alterations in *Ruhrgas*)). Thus, "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585. *See also Sinochem Int'l Co.* v. *Malaysian Int'l Shipping Corp.*, 127 S. Ct. 1184 (2007).

Those cases make clear that nothing in Article III or this Court's jurisdictional precedents compelled the Federal Circuit to resolve the question of its subject-matter jurisdiction before applying Section 2501 as a matter of discretion, regardless of its waivability. The court would decide the same substantive limitations question in either event.

The court of appeals' failure to address the alternative, discretionary barrier to jurisdiction was particularly problematic in this case. Courts have a well-established obligation to avoid resolving questions of constitutional law unnecessarily. See *United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 785 (2007) (declining to address a constitutional question that was not "absolutely necessary to a decision of the case")

(quoting *Ashwander* v. *TVA*, 297 U.S. 288); *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."). While courts have no general obligation to postpone questions of their jurisdiction, different considerations arise when the question of jurisdiction implicates questions of constitutional law. Cf. *Carnival Cruise Lines* v. *Shute*, 499 U.S. 585, 589 (1991) (declining to consider "constitutional argument as to personal jurisdiction" and resolving issue of contract interpretation of forum selection clause). This is particularly true when – as under the Tucker Act – jurisdiction is conferred on a federal court by statute. See *Gomez* v. *United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

In this case, the Court's resolution of the question of whether Section 2501's time limitation is jurisdictional implicates important constitutional questions. Petitioner and its *amici* urge this Court to construe the Fifth Amendment to hold that the government does not have sovereign immunity under the Takings Clause. See Pet. Br. 10-11; Br. *Amicus Curiae* of Pac. Legal Found. in Support of Pet. 3-6; Br. *Amicus Curiae* of Nat'l Ass'n of Home Builders in Support of Pet. 14-21. Moreover, the answer to the question presented is rooted in the power of federal courts to decide cases and controversies. Each determination of jurisdiction derives ultimately from the extension of "[t]he judicial power" under Article III of the Constitution, and thus, an inquiry into Section 2501's jurisdictional status is an inquiry into the ability of the Court of Federal Claims to constitutionally exercise its judicial power over claims filed against the United States.

Moreover, the jurisdictional character of Section 2501 also implicates the ability of the Court of Federal Claims to "render judgment upon any claim against the United States founded . . . upon the Constitution," 28 U.S.C. 1491(a)(1), depending on when such claim accrues. Pet. at 1.

In addition, petitioner's arguments seek, for all intents and purposes, to overturn precedent holding that Section 2501 is a condition on the federal government's waiver of its sovereign immunity and therefore is jurisdictional. Pet. Br. 30-32. Conversely, *amicus* argues later in this brief that the precedents on which respondent relies should be limited or overturned to the extent they conflict with this Court's decision in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007). See Part II, *infra*. Whatever the ultimate answer to those difficult questions, basic principles of *stare decisis* dictate that precedent should be overturned only when truly necessary to the decision of a case. See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 63 (1996) ("Generally, the principle of *stare decisis*, and the interests that it serves, . . . counsel strongly against reconsideration of our precedent."). When, as here, there are non-constitutionally sensitive grounds for resolving a case, consistent with principles of stare decisis, those arguments should be resolved at the outset.

In short, given the difficult and sensitive legal implications of the jurisdictional question, the Federal Circuit in this case was under an obligation, rooted in constitutional separation-of-powers concerns, to dispose of the case on a ground that avoided triggering constitutional and stare decisis concerns and to decide the case on the alternative and narrower ground that Section 2501 barred petitioner's claim as a matter of discretion. Cf. *Plaut* v. *Spendthrift Farm*, 514 U.S. 211, 217 (1995) (addressing "the narrower ground for adjudication of the constitutional questions in the case"). The court of appeals' assumption that Article III *required* it to

resolve the question of Section 2501's jurisdictionality, before reaching any other issue, thus gets this Court's precedent and constitutional principles of judicial restraint backwards.

B. THERE WERE NO BARRIERS TO THE FEDERAL CIRCUIT'S APPLICATION OF SECTION 2501'S TIME LIMIT AS A MATTER OF DISCRETION.

Nothing in the procedural history of this case precluded the Federal Circuit from dismissing the case on discretionary, rather than subject matter jurisdiction, grounds. While courts generally limit themselves to the questions presented by the parties, the discretion to entertain a threshold defense not raised by a party is an "inherent power of lower federal courts." *Chambers* v. *NASCO*, 501 U.S. 32, 46 (1991). These inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) (concluding that a district court possessed the inherent power to dismiss a case *sua sponte* for failure to prosecute).

A court accordingly may, in appropriate circumstances, raise and decide issues – including the invocation of a statutory time limit – *sua sponte*.[4] That same authority permits a

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[4] *See Day* v. *McDonough*, 547 U.S. 198, 205-06 (2006) (treating statute of limitations, exhaustion, and retroactivity defenses similarly and concluding that "federal appellate courts have discretion to consider" these defenses "despite the State's failure to interpose the defense at the district-court level"); *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994) (exercising discretion to address retroactivity defense not raised below); *Granberry* v. *Greer*, 481 U.S. 129 (1987) (court of appeals had discretion to determine whether an exhaus-

federal court to decide issues raised by *amici curiae*. See, *e.g.*, *Demore* v. *Kim*, 538 U.S. 510, 516 (2003) (addressing argument raised by *amici* that statute foreclosed judicial review); *Fry* v. *United States*, 421 U.S. 542, 545 n.5 (1975) (addressing statutory argument raised by *amici*). The courts of appeals have invoked their discretion to determine whether an issue raised by *amici* on appeal is appropriate for resolution, and have reached different results depending on the factual circumstances of the case.[5]

The Federal Circuit's resolution of the alternative, non-jurisdictional argument concerning discretionary application of Section 2501 was particularly warranted in this case, for four reasons. First and most importantly, as the court of appeals recognized, Metamora is not an ordinary *amicus* and, in fact, has a "substantial interest . . . in this litigation." *John R. Sand & Gravel Co.* v. *Brunswick Corp.*, 143 F. App'x. 317, 319 (Fed. Cir. 2005). Metamora's interest is much stronger

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tion defense has been properly waived); *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 502 (1947) (a federal court "has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*").

[5] See *Mass. Food Ass'n* v. *Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 568 (1st Cir. 1999) ("[*A*]*mici*, like respondents, can advise the Supreme Court of missing arguments."); *Swan* v. *Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993) (declining to address issue first raised by *amici* on appeal); *Molina* v. *INS*, 981 F.2d 14, 20 (1st Cir. 1992) (addressing issue first raised by *amici* on appeal); *Pinney Dock & Transp. Corp.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1454 n.11 (6th Cir. 1988) (addressing new issues raised by *amici* that were "similar to" issues presented by the parties).

than that of a traditional *amicus*. Metamora is composed of the "manufacturing industries that had contributed waste to [the] landfill." *Id.* at 318. "By Consent Decree following suit by the United States Environmental Protection Agency . . . the Metamora Group agreed to clean up the landfill and to hold the United States harmless from any claims arising from the cleanup." *Ibid.* (citation omitted). The Consent Decree thus plays a central role in the determination of who will pay any judgment entered in favor of petitioner in this case. Indeed, the position of the United States is that "any judgment against the United States would be passed on to the Metamora Group in accordance with the Consent Decree." *Ibid.*[6]

For that reason, Metamora has played a uniquely prominent role in virtually every aspect of this case. As counsel for the United States explained:

> [T]he Metamora [G]roup is in fact the silent giant or the big bear in the back of every room. Every time I respond to discovery, every time I need technical information, every time I go to work on the exhibits, I have to talk to the Metamora [G]roup, because it is their contractor [whose actions gave rise to the takings claim] and they have been doing the cleanup for a number of years and they have all the technical information.

John R. Sand & Gravel Co. v. *United States*, 60 Fed. Cl. 272, 275 (2004). Indeed, the United States did not oppose Meta-

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[6] To be sure, Metamora's liability would not follow automatically from a judgment in petitioner's favor. Metamora could attempt to persuade the court overseeing the consent decree not to impose liability by, for example, refusing to recognize a judgment of the Court of Federal Claims in favor of petitioner or by construing the Decree not to require Metamora to indemnify the United States.

mora's motion to intervene in the trial court proceedings, and Metamora was also invited to participate in early settlement negotiations between petitioner and respondent. *John R. Sand & Gravel Co.*, 143 F. App'x. at 318.

The Federal Circuit, in turn, indicated that Metamora should participate as an *amicus curiae* in the court of appeals. When the trial court denied intervention (principally on the ground that the request was made too late), Metamora appealed. In holding that the trial court had not abused its discretion in denying Metamora party status, the court of appeals stressed that its ruling was "without prejudice to the application of the Metamora Group to participate as *amicus curiae* in any appeal to this court of the decision on the merits" by the trial court. *Id.* at 319.

Second, the parties had fair notice of Metamora's argument concerning application of the statutory time limitation. Whether the parties have "fair notice and an opportunity to present their positions" is a weighty factor in entertaining arguments raised by *amici*. See *Day*, 547 U.S. at 210; see also *Granberry*, 481 U.S. at 131, 136. This Court has placed a premium on whether the issue was litigated in the lower court. "[Determining whether an issue has been passed on below is] essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . ." *Singleton*, 428 U.S. at 120 (quoting *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941)).[7] In this case, peti-

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[7] Likewise, in *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality decision), the Court addressed the retroactivity of a new rule that fairness in a jury selection required the proportional representation of races on a jury even though the issue was only raised by an *amicus*. In so doing, the Court stressed that the "*question is not foreign to the parties, who have addressed retroactivity* with re-

tioner and respondent litigated the issue at length in the trial court. Although Metamora's motion to intervene in the trial court was ultimately denied, it asserted a timeliness defense in its proposed Answer. As also noted *supra*, the issue was extensively briefed on appeal in the Federal Circuit after it was raised by Metamora as an *amicus*. Petitioner fully briefed the statutory time limitation question in its Reply Brief, see Plaintiff-Appellant Reply Br. 13-14, *John R. Sand & Gravel Co.* v. *United States*, 457 F.3d 1345 (Fed. Cir. 2006), and the parties addressed the issue at oral argument, Pet. App. 14a.

Third, and relatedly, petitioner was not unfairly prejudiced by consideration of Metamora's argument. See *Day*, 547 U.S. at 210 (identifying prejudice to the parties as a factor in entertaining arguments raised by *amici*); see also *Granberry*, 481 U.S. at 131, 136. Quite the opposite, petitioner vigorously argued against application of Section 2501 to its claim throughout the litigation. Nor could petitioner be surprised at Metamora's participation in the litigation and assertion of such arguments against relief, given Metamora's recognized and substantial interest in the outcome of the case. Equally importantly, as the court of appeals recognized, "the pertinent jurisdictional facts are not in dispute." Pet. App. 15a.

Fourth, "the interests of justice would be better served" by considering Metamora's argument that Section 2501 bars the suit as a matter of discretionary application. *Day*, 547 U.S. at 210. As noted *supra*, the interests of justice are served by having courts avoid questions that implicate sensitive constitutional concerns or principles of stare decisis. Beyond that, Metamora's arguments merit particular consid-

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spect to petitioner's *Batson* claim." *Id.* (citations omitted) (emphasis added).

eration given its substantial and direct interest in the litigation and its outcome. As noted, respondent contends that any judgment in the case must be paid by *amicus*. A rule precluding *amicus* from protecting its interests by raising meritorious defenses would allow parties to defend litigation only on grounds of their particular choosing (such as the merits of the takings claim here), safe in the knowledge that, if those defenses fail, the damages in the suit will be paid by a third party. The resulting prejudice to that third party, who would be saddled with liability for a money judgment without having an opportunity to have its arguments against liability considered, would be profoundly unjust and contrary to the public interest.

Petitioner argues that *Day*, 547 U.S. at 202, holds that "it would 'count' as an 'abuse of discretion' for a court to override a party's 'deliberate waiver of a limitations defense.'" Pet. Br. 47. That misreads *Day*. In fact, *Day* held only that the determination of whether to adjudicate a waived statute of limitations defense was a matter for the court's discretion. While the Court concluded in *Day* that it would be an "abuse of discretion" for a court to override a deliberate waiver in that case, it did not involve an argument raised by a party with a distinct and substantial interest in the outcome of the case. Moreover, petitioner's argument presumes that Section 2501's time limit is waivable, which, as explained *infra*, is not the case. *Day* simply has no application to Section 2501.

This Court should accordingly affirm or dismiss the writ as improvidently granted.[8]

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[8] At the very least, if this Court deems the limitations period non-jurisdictional, it should remand the case to the lower court with instructions to exercise its discretion whether to decide the issue. See *Granberry* v. *Greer*, 481 U.S. 129, 136 (1987) (vacating and remanding with instructions to exercise discretion where lower

II. SECTION 2501 IS A MANDATORY, JURISDICTIONAL LIMITATION ON THE FILING OF SUITS AGAINST THE UNITED STATES.

Should the Court choose to address the question whether Section 2501 is a limitation on federal court jurisdiction, the judgment of the court of appeals should be affirmed. This Court has repeatedly held that similar statutory limitations on the time within which cases must be filed in federal court are jurisdictional and, as the court of appeals properly recognized, that principle applies with particular force when the time limitation is also a condition on Congress's waiver of the United States' sovereign immunity.

A. THIS COURT'S DECISION IN *BOWLES* V. *RUSSELL* CONFIRMS THIS COURT'S REPEATED PRIOR HOLDINGS THAT SECTION 2501 LIMITS THE COURT OF FEDERAL CLAIMS' SUBJECT-MATTER JURISDICTION.

The Solicitor General has collected the numerous decisions of this Court holding that Section 2501 is jurisdictional and further that it is not subject to tolling for reasons other than those specified in the statute. See BIO 9-10 (citing *e.g.*, *Soriano* v. *United States*, 352 U.S. 270, 273-77 (1957)). Those repeated, consistent, and longstanding holdings fully comport with this Court's more recent jurisprudence.

Just four months ago, this Court held that the federal statute permitting a district court to reopen the time for filing a notice of appeal, see 28 U.S.C. 2107(c), is jurisdictional. *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007). In so holding, the

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court "made no attempt" to exercise its discretion); *Gray* v. *Netherland*, 518 U.S. 152, 166 (1996) (remanding to court of appeals to determine whether issue was properly raised).

Court relied on its "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 2364. "[I]t is indisputable," this Court explained, "that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Id.* at 2364 n.2; see *Scarborough* v. *Pargoud*, 108 U.S. 567, 568 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction."); *United States* v. *Curry*, 47 U.S. 106, 113 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.").

The Court further explained that the longstanding treatment of statutory time limitations as jurisdictional was proper because the "time limitation is set forth in a statute" enacted by Congress. *Bowles*, 127 S. Ct. 2364. This is because the Constitution charges Congress with establishing the jurisdiction of federal courts, U.S. Const. art. III, § 1, and Congress's power to decide *what* cases federal courts can hear necessarily includes the corollary power to decide *when* cases may be heard. *Id.* at 2365. The Court explained:

> Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. *Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.* Put another way, *the notion of* "subject-matter" jurisdiction obviously extends to "classes of cases . . . falling within a court's adjudicatory authority," *but it is no less "jurisdictional"* when Congress forbids federal courts from adjudicating an otherwise legitimate "class of cases" after a certain period has elapsed from final judgment.

Id. at 2365-66 (emphasis added) (internal quotation marks and citations omitted).

The fact that a time limitation on the filing of litigation is set forth by Congress as a statutory limitation is thus of critical "jurisdictional significance." *Id.* at 2364 n.2. Indeed, when Congress statutorily constrains the filing of suits in federal court, the courts have "no authority" to expand their own jurisdiction by "creat[ing] equitable exceptions to jurisdictional requirements." *Id.* at 2366.[9]

Section 2501, like the statutory provision at issue in *Bowles*, is a statutory component of Congress's determination of "when, and under what conditions," the Court of Federal Claims has the authority to hear cases. *Id.* at 2365-66. While *Bowles* addressed a statutory time limit for initiating appellate litigation, the Court's reasoning equally embraces the initiation of litigation in a trial court. Indeed, there is no sound basis for distinguishing the two situations. As *Bowles* acknowledged, "Congress decides whether federal courts can hear cases *at all*," and that authority necessarily encompasses "when, and under what conditions" trial courts may hear cases, as much as appellate courts. *Id.* at 2365 (emphasis added). Indeed, *Bowles* reasoned that "the notion of 'subject-matter' jurisdiction obviously extends to 'classes of cases . . . falling within a court's adjudicatory authority,'" *id.* (quoting *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam), including – but certainly not limited to – appellate litigation, *id.* at 2365-66 (explaining that the jurisdictional bar applies "no less" to appeals than to other "'classes of cases'

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[9] For that reason, the Court in *Bowles* overruled *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), which had previously held that federal courts could apply a "unique circumstances" exception to equitably extend Section 2107(c)'s time limit.

falling within the courts' adjudicatory authority") (quoting *Eberhart*, 546 U.S. at 16). See also *Kontrick* v. *Ryan*, 540 U.S. 443, 453 & n.8 (2004) (explaining that the time limit governing the initial filing of tort claims against the United States is jurisdictional) (cited in *Bowles*, 127 S. Ct. at 2364-65).

Petitioner has identified no sound basis for departing in this case from *Soriano*, *Bowles*, and the related decisions of this Court. Indeed, judicial restraint in changing course should be particularly heightened in this context for three reasons. First, as the Solicitor General explains, Section 2501 is a limitation and condition on Congress's waiver of the United States' sovereign immunity. Waivers of sovereign immunity must be narrowly construed. See BIO 10. Second, courts should be especially hesitant to revisit or modify precedent when the result would be to expand the court's jurisdiction. The constitutional separation of powers does not permit such judicial self-help, and accordingly any decision to displace a longstanding jurisdictional bar should be undertaken only with the clearest congressional direction. See *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1867 (2006) ("With federal courts thus deciding issues they would not otherwise be authorized to decide, the 'tripartite allocation of power' that Article III is designed to maintain would quickly erode[.]") (citations omitted); *Snyder* v. *Harris*, 394 U.S. 332, 341-42 (1969) ("If there is a present need to expand the jurisdiction of [federal] courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts."); *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (explaining "the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes"). There is no such congressional direction here. Third, judicial restraint is particularly appro-

priate when – as here – the question to be adjudicated implicates the constitutionality of the actions of a coordinate branch of government. See *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State*, 454 U.S. 464, 474 (1982) (adjudicating the constitutionality of coordinate branches' acts "has been recognized as a tool of last resort"); *Coleman* v. *Miller*, 307 U.S. 433, 463-64 (1939) (opinion of Frankfurter, J.) ("The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined.").[10]

In short, the conclusion that Section 2501 is jurisdictional is compelled by this Court's precedent addressing both Section 2501 itself and related statutory limitations on the initiation of litigation.

B. PETITIONER'S ATTEMPTS TO DISTINGUISH THIS COURT'S PRECEDENT ARE UNAVAILING.

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[10] The constitutional nature of a claim brought against the United States does not undermine *Bowles*'s applicability to Section 2501, which limits the Court of Federal Claims' authority to hear, among other things, claims founded upon the United States Constitution. 28 U.S.C. 1491(a)(1). Petitioner's underlying claim in this matter is a constitutional claim. Congress, however, is empowered to statutorily restrict the jurisdiction of courts to hear constitutional claims by imposing time limitations. See, *e.g.*, *California* v. *Arizona*, 440 U.S. 59, 65 (1979) (observing that even the Court's original, "self-executing" jurisdiction under the Constitution is subject to terms of the government's waiver of sovereign immunity); *Block* v. *North Dakota*, 461 U.S. 273, 292 (1983) ("[a] constitutional claim can become time-barred just as any other claim can") (citing *Soriano* and *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980)).

Petitioner contends that other decisions of this Court's decisions establish that Section 2501 is not jurisdictional. Pet. Br. 33-37. Petitioner, however, misunderstands the import of those decisions, none of which (unlike *Soriano* and the other precedents cited by the Solicitor General) addressed Section 2501 itself.[11]

Petitioner places particularly heavy reliance on *Day* v. *McDonough*, 547 U.S. 198 (2006), which is properly distinguished. In *Day*, this Court held that federal courts were

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[11] *Kontrick* involved a "procedural rule[] adopted by the Court for the orderly transaction of its business," rather than a congressionally enacted statutory time limitation on federal court jurisdiction. *Bowles*, 127 S. Ct. at 2364 (citing *Kontrick*, 540 U.S. at 454)). Although *Kontrick* read the word "jurisdictional" to refer to those "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the person (personal jurisdiction) falling with a court's adjudicatory authority," *id.* at 456, *Bowles* made clear that *Kontrick*'s definition of "jurisdictional" was not exhaustive, concluding that "it is no less 'jurisdictional' when Congress forbids federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment." 127 S. Ct. at 2366. Moreover, *Kontrick* even recognized that the time limit governing the initial filing of tort claims against the United States, analogous to Section 2501, is jurisdictional within the meaning ascribed to that term in *Kontrick*. 540 U.S. at 454.

Scarborough v. *Principi*, 541 U.S. 401 (2004), involved a time limit not on initiating litigation, but on filing an application for attorney's fees at the end of a case. The time limit thus "relate[d] only to postjudgment proceedings auxiliary to cases already within [the] court's adjudicatory authority," *id.* at 414, and thus did not concern the court's subject matter jurisdiction over the action because it was "ancillary to [a] judgment" that already had been properly issued within the court's jurisdiction. *Bowles*, 127 S. Ct. at 2365 (quoting *Scarborough*, 541 U.S. at 412)).

permitted, but not required, to raise the one-year time limitation on habeas corpus petitions in 28 U.S.C. 2244(d)(1)(A). 547 U.S. at 209. This Court explained, however, that a time limitation in the habeas context, like other threshold habeas defenses – exhaustion of state remedies, procedural default, and nonretroactivity – operated to "implicat[e] values beyond the concerns of the parties" which permitted a district court to invoke "considerations of comity, finality, and the expeditious handling of habeas proceedings" in support of the historically (and constitutionally) unique equitable power of a court in habeas corpus. *Id.* at 205, 208 (citations omitted). Given the distinct constitutional status of the Great Writ, U.S. Const. art. I, § 9, principles governing the authority of courts to review the detention of individuals do not translate readily to the general civil litigation context – a fact underscored by *Bowles*'s silence on that subject. See *INS* v. *St. Cyr*, 533 U.S. 289, 311-12 (2001) (explaining general differences between habeas corpus and judicial administrative review, and requiring extraordinarily express congressional statements to impair the writ).

In addition to being limited to the unique considerations applicable to habeas corpus proceedings, the decision in *Day* involved a statute that explicitly "call[ed] for the forfeiture rule" by containing the language "[a] 1-year *period of limitation*." 547 U.S. at 213 (Scalia, J., dissenting) (emphasis in original). In contrast, Section 2501 contains no such language. Moreover, unlike the statute at issue in *Day*, which concerns proceedings in which the federal government is not a defendant, Section 2501 is an integral component of the United States' waiver of sovereign immunity. *Day* is therefore simply not instructive in the context of Section 2501.

To the extent that *Day* is instead read to rule categorically that time limits for bringing suit in federal court are non-jurisdictional, that holding should be revisited in light of

Bowles. As explained above, *Day* concluded that a statute of limitations defense is not "jurisdictional" in the habeas corpus context, 547 U.S. at 204, whereas *Bowles* concluded that "it is no less 'jurisdictional' when Congress forbids federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment." 127 S. Ct. at 2366. The decision in *Bowles* was more firmly rooted in this Court's precedent addressing time limitation issues than in *Day*. To the extent *Day* considered such precedent, it did so only in the context of habeas corpus, which places a distinct set of inherent powers and discretionary concerns within a federal court's ambit. Accordingly, this Court should reaffirm the firmly established principles identified in *Bowles* and conclude that the holding in *Day* adopts no categorical rule.

C. THE CONCLUSION THAT SECTION 2501 IS JURISDICTIONAL IS CONSISTENT WITH THIS COURT'S EQUITABLE TOLLING JURISPRUDENCE.

Contrary to petitioner's argument (Pet. Br. 12), the conclusion that Section 2501 is jurisdictional comports with this Court's equitable tolling decision in *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 94-96 (1990). In *Irwin*, this Court held that the time limit for filing a civil action against the federal government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), is subject to equitable tolling in appropriate circumstances. While recognizing that prior precedent cautioned against permitting equitable tolling of statutes of limitation, the Court in *Irwin* concluded that, as a general matter, "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Irwin*, 498 U.S. at 95. The

Court accordingly held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. The Court stressed, however, that the presumption was meant to operate as "a realistic assessment of legislative intent," *id.* at 95, and that no equitable tolling would be available when the statutory text enacted by Congress indicates a contrary intent, *id.* at 96.

Petitioner contends (Pet. Br. 33-34) that *Irwin* precludes the conclusion that Section 2501 is jurisdictional. That is wrong for two reasons. First, the availability of equitable tolling says little about whether a time limit is jurisdictional. Rather, as *Irwin* indicates, the existence of equitable tolling is a distinct statutory construction inquiry that is undertaken both for jurisdictional and non-jurisdictional time limitations. Indeed, in *Irwin*, after the Court rejected the plaintiff's equitable tolling argument on the merits, the Court affirmed the court of appeals' dismissal of the case for lack of subject-matter jurisdiction. See *Irwin*, 498 U.S. at 95; see also *Irwin* v. *Veterans Admin.*, 874 F.2d 1092, 1096-97 (5th Cir. 1989). Congress's authority to decide whether and when federal courts may hear cases necessarily subsumes the power – if Congress so chooses – to vest courts with the authority to make equitable exceptions to a jurisdictional bar in extraordinary circumstances. The question, at bottom, remains one of statutory construction. Petitioner thus errs in assuming some fundamental incompatibility between a statute's potential susceptibility to equitable tolling and its jurisdictional status.

Moreover, there is no tension between the holdings of *Bowles* and *Irwin*, because the holding of both cases is the same – that "excusable neglect" does not excuse noncompliance with a statutory time limit. See *Bowles*, 127 S. Ct. at 2366 (overruling *Harris Truck Lines, Inc.* v. *Cherry Meat*

Packers, Inc., 371 U.S. 215 (1962), which had been based on a finding of "excusable neglect"); *Irwin*, 498 U.S. at 95 ("the principles . . . [justifying equitable tolling] do not extend to what is at best a garden variety claim of excusable neglect"). Rather, equitable tolling is available only in the rarest of circumstances. *Irwin*, 498 U.S. at 95 (noting that the courts "have typically extended equitable relief only sparingly," and recognizing only two circumstances where tolling might be appropriate).

Second, and in any event, Section 2501 is not subject to equitable tolling. That is what this Court held in *Soriano*. See 352 U.S. at 273-77; see also *Kendall*, 107 U.S. at 124-26. *Irwin* did not purport to overrule *Soriano* or any of its predecessor decisions. Nor does *Irwin*'s analysis cast doubt on *Soriano*'s holding. That is because *Irwin*'s rebuttable presumption is just that – a presumption about congressional intent that may be rebutted by contrary evidence. In fact, this Court has held twice since *Irwin* that equitable tolling is not applicable to a statutory time limit for filing claims against the Government "where it is inconsistent with the text of the relevant statute." *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998); see also *Young* v. *United States*, 535 U.S. 43, 49-50 (2002); *United States* v. *Brockamp*, 519 U.S. 347 (1997).[12]

The text of Section 2501 is incompatible with equitable tolling. *Irwin* itself acknowledged that the language in Section 2501 providing that "every claim . . . shall be barred unless the petition . . . is filed . . . within six years," 28 U.S.C. 2501, is far "more stringent" than the text of Title VII that was at issue in *Irwin*. 498 U.S. at 95; cf. 42 U.S.C.

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[12] The conclusion that Section 2501 is jurisdictional has been repeatedly confirmed by the Federal Circuit post-*Irwin*. See Pet. App. 16a, 18a (collecting cases).

2000e-16(c) (providing only that "within thirty days . . . an employee . . . may file a civil action").

Furthermore, when Congress wanted to create exceptions to Section 2501's jurisdictional bar, it said so explicitly. Section 2501 provides that "[a] petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases." 28 U.S.C. 2501. Adopting a general equitable tolling exception to Section 2501 thus "would be doing little more than overriding Congress' judgment as to when equity requires that there be an exception to the limitations bar," *United States* v. *Dalm*, 494 U.S. 596, 610 (1990), and would render the statutory tolling provision largely superfluous, contrary to established principles of statutory construction, including *expressio unius est exclusion alterius*. See *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) ("The rule against superfluities complements the principle that courts are to interpret the words of a statute in context."); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous."). See also *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("The most natural reading of [15 U.S.C.] § 1681p is that Congress implicitly excluded a general discovery rule by explicitly including a more limited one") (citing *Leatherman* v. *Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993)).

That principle of statutory construction has been affirmed by this Court in the equitable tolling context. See *Beggerly*, 524 U.S. at 48 (noting that the language of 28 U.S.C. 2409(a), explicitly delaying accrual "until the plaintiff 'knew or should have known of the claim of the United States,' has already effectively allowed for equitable tolling"); *Brockamp*, 519 U.S. at 351 ("[26 U.S.C.] § 6511 sets forth explicit exceptions to its basic time limits, and those

very specific exceptions do not include 'equitable tolling'") (citing 26 U.S.C. 6511(d)).

Section 2501, moreover, applies only to suits against the federal government and thus does not implicate the concern for uniformity in construing and applying a single limitations provision to both public and private lawsuits. While the Court concluded in *Irwin* that Congress would not have intended the same statutory text to permit equitable tolling against one class of defendants (private parties) while foreclosing it against governmental defendants, see 489 U.S. at 95, construing Section 2501 consistent with its strict terms does not pose any such incongruity.

Dicta in *Scarborough* v. *Principi*, 541 U.S. 401 (2004), questioned the government's argument that *Irwin*'s rebuttable presumption is inapplicable to causes of action "that have no analogue in private litigation," and stated that "it is hardly clear that *Irwin* demands a precise private analogue." *Id.* at 422. The Court ultimately found that, in any event, there were private analogues to the fee-shifting statute at issue in *Scarborough*. *Id.* [13] As noted *supra*, however, *Scarborough* involved a question of ancillary jurisdiction over fee claims at the conclusion of litigation, and thus does not speak to time limits governing the commencement of litigation. Beyond that, the Court in *Scarborough* expressly declined to consider whether equitable tolling applied to the relevant

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[13] A claim seeking just compensation for property taken by the government is fundamentally distinct from any private cause of action relating to property. Even aside from the fact that the claim may, by definition, be brought only against the government, the government alone has the power to commit the act that triggers the right to just compensation: only the government is empowered to compel an involuntary transfer of property by taking it without consent and making payment. U.S. CONST. AMEND. V.

time limit, *id.* at 421 n.8, and, therefore, the scope of *Irwin* was not truly at issue.

In any event, the point is not that the absence of a "precise private analogue," *id.* at 422, by itself automatically renders a statute jurisdictional. Rather, the existence of equitable tolling remains a question of statutory construction, and the conclusion in *Irwin* that the meaning of statutory text does not change depending on which defendant is before the court can be considered relevant evidence of congressional intent to permit a uniform tolling rule. By the same token, the absence here of any such potential incongruity in the operation of a single limitations period or similarly worded limitations periods constitutes evidence weighing against the importation of tolling principles – especially when coupled with Section 2501's explicit limitation of tolling to certain specified circumstances. Therefore, a holding by this Court that Section 2501 is jurisdictional, consistent with its holding in *Bowles*, would not be in conflict with *Irwin*.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed or the writ of certiorari dismissed as improvidently granted.

Respectfully submitted,

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